IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ROLANDO BELTRAN,	§	
	§	
Plaintiff	§	
	§	
v.	§	**C.A. No. 5:15-CV-1019-RP**
	§	
UNION PACIFIC RAILROAD COMPANY,	§	
	§	
Defendant	§	

DEFENDANT UNION PACIFIC RAILROAD COMPANY'S
MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF THE COURT:

NOW COMES Defendant, Union Pacific Railroad Company ("Union Pacific") and, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, respectfully moves for summary judgment and would show the court as follows:

I.
GENERAL BACKGROUND

Plaintiff, Rolando Beltran, alleges Union Pacific discriminated against him under the Texas Commission on Human Rights Act ("TCHRA"). Plaintiff contends that his termination was the result of discrimination based upon his gender, race, disability, and age. This claim is based on:

1) Plaintiff's termination on January 9, 2015, due to his failure to pass a randomized drug test in violation of both a company-wide policy and an explicit reinstatement agreement.

2) Plaintiff's personal belief that Union Pacific has a history of discriminating against individuals over 40 years-old, males, Hispanics, and employees with disabilities.

3) Plaintiff's belief that neither the medical review officer nor Union Pacific (during the investigation hearing) took into account his prescribed and over-the-counter ("OTC") medications.

4) Plaintiff's belief that his urine sample was not tested properly, alleging a collusion effort between the independent testing laboratories, the independent medical review officer, and Union Pacific to discriminate against him.

II.
FACTUAL BACKGROUND

Plaintiff began working for Union Pacific in 2004 as a carman apprentice. (Exhibit A, Plaintiff's Dep. at 25:3-16). On December 24, 2010, his employment was terminated for violating a company-wide rule when a random drug test came back with positive results for "cocaine metabolites". (Ex. A at 37:2-7). He then spoke with the medical review officer ("MRO") and furnished a list of prescriptions that he was taking at the time, but none of them accounted for the presence of cocaine in his system. (Ex. A at 42: 17-43:5). Plaintiff now admits that he was using cocaine at the time, but he challenged those results and asked for a split sample, which also proved to be positive. (Ex. A. at 39:25 - 39:15). Three months later, on April 25, 2011, Plaintiff was rehired to work for Union Pacific based on two conditions: that he enter a rehabilitation facility and remain there for 28 days (paid for by Union Pacific), and that he would be subject to random drug testing at any time over the next 60 months following his reinstatement.

(Ex. A at 40:7 - 41:9). Understanding these conditions Plaintiff agreed to the terms, completed rehabilitation and was then reinstated. (Ex. A, 41:22 – 42:6). On February 24, 2014, Plaintiff was promoted to car foreman. (Exhibit E, Defendant's Ex. 1 at page 2; Ex. A at 82:22-25).

On November 20, 2014, Plaintiff submitted to a random drug test where he tested positive for amphetamines/methamphetemines. (Ex. A at 48:1-12; Exhibit B, Pl's Drug Test History "Employee Testing History"). On November 25, 2014, Union Pacific's contracted medical review officer ("MRO"), Dr. Randy Barnett[1], initiated a telephone conversation with Plaintiff and asked him to disclose the prescription medications that he was taking at the time. (Ex. A at 55:10-21; Exhibit C, Dr. Barnett's Dep. at 39:18-40:2; Exhibit D, Plaintiff's Pet. at ¶ 14). Dr. Barnett determined that none of the medications Plaintiff described to him would account for the positive results, and thus confirmed the positive result. (Ex. A at 57:1-6). On January 7, 2015, an investigation hearing was held regarding Plaintiff's positive test results, which included a review of all the prescription and over-the-counter medications he was taking. (Ex. D at ¶ 15). During this hearing, David Neff, General Chairman of Plaintiff's union[2] gave testimony that the prescribed medications Plaintiff was taking at the time caused false positives for amphetamines or methamphetamines based on the written medical opinion of Dr. Zeitlin. (Ex. D at ¶ 16). Dr. Zeitlin's opinion in the matter was solicited by Plaintiff upon recommendation by his brother, who also works in the medical field. (Ex. A at 60:15-61:25).

[1] Dr. Randy Barnett is not an employee of Union Pacific. He is an independent MRO, contracted with University Services to review positive drug test results of its employees.
[2] Plaintiff was a union-member of the American Railway and Airway Supervisors Association or ARSA.

A couple of days after the hearing, on January 9, 2015, Plaintiff received a Notification of Discipline Assessed, which stated his "permanent dismissal" effectively terminating his employment with Union Pacific. (Ex. D at ¶ 17; Ex. A at 63:17-23). Thereafter, Plaintiff alleged that Union Pacific terminated him because he is a 42-year old, Hispanic male with a disability of morbid obesity. (Ex. D at ¶ 19). He filed a charge of discrimination with the EEOC and the Civil Rights Division of the Texas Workforce Commission ("TWC"). (Ex. D at ¶ 19). On September 28, 2015, TWC dismissed Plaintiff's claims. (Ex. D at ¶ 7). Since all of Plaintiff's administrative remedies were exhausted, he received a Notice of Right to File a Civil Action. (Ex. D at ¶ 7). Plaintiff then submitted this suit to state court and it was removed to federal court by motion from Union Pacific.

III.
SUMMARY JUDGMENT STANDARDS

Under Federal Rules of Civil Procedure, a party may move for summary judgment if there are no genuine issues of material fact and he or she is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "Material" facts are those which might affect the outcome of the lawsuit under the governing law, and an issue is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc*. 477 U.S. 242, 248 (1986). The moving party bears the initial burden of showing an absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party demonstrates the absence of evidence, the burden shifts to the nonmoving party to provide specific facts to show that a genuine issue for trial does exist. *Id.* at 324.

A scintilla of evidence in support of the plaintiff's position is not sufficient; there must be evidence to support the jury to reasonably find for the plaintiff. *Anderson*, 477 U.S. at 252. "Conclusory allegations, unsubstantiated assertions, improbable inferences, [and] unsupported speculation," are all insufficient to reasonably find for the plaintiff. *Bank of America, N.A. v. Fulcrum Enter., LLC,* 20 F.Supp.3d 594, 603 (S.D. Tex. 2014). Furthermore, if the evidence presented is merely colorable or not significantly probative, then summary judgment may be granted. *Anderson*, 477 U.S. at 249-50. When the record is viewed in the light most favorable to the nonmoving party and that party has the benefit of all reasonable inferences, then summary judgment is appropriately granted for the moving party if there is no genuine issue of material fact. *Ray v. Union Pacific RR. Co*., 971 F. Supp.2d 869, 876 (S.D. Iowa 2013). In other words, the court must grant summary judgment if the plaintiff fails to sufficiently establish the existence of an element essential to his case on which he will bear the burden of proof at trial. *Fulcrum*, 20 F.Supp.3d at 603.

IV.
ARGUMENT AND AUTHORITIES

Union Pacific did not terminate Plaintiff based on his age, gender, ethnicity, or disability. He was terminated because he violated both the terms of his reinstatement agreement and Union Pacific's company-wide drug policy after he tested positive for amphetamines/methamphetamines. Plaintiff's claim that he was terminated because he was a Hispanic, male, over the age of 40 and morbidly obese, are meritless and unsupported.

Furthermore, federal laws and regulations apply to Union Pacific employees in regards to drug and alcohol abuse. Plaintiff's urine sample tested positive for an illegal substance, two independent laboratories that conducted separate testing confirmed these results and an independent MRO reviewed the results and determined that Plaintiff had no adequate explanation for his result. At that point, Union Pacific had a legal obligation as a common carrier to remove Plaintiff from service and terminate his employment. There was no discriminatory animus preceding Union Pacific's action. Union Pacific is furthermore entitled to summary judgment because Plaintiff has failed to meet his burden of proving the elements of a *prima facie* claim of has otherwise failed to establish a viable claim. Moreover, even assuming Plaintiff could establish a *prima facie* claim, Defendant had a *legitimate, non-discriminatory* reason for Plaintiff's termination.

A. Prima Facie Elements for a Discrimination Claim Under the TCHRA

In interpreting the TCHRA, Texas Legislature intended the act to correlate with federal law in employment discrimination cases, therefore courts look to federal law for guidance.[3] Under the TCHRA an employer may not discipline or discharge an employee on the basis of race, disability, sex, national origin, or age.[4] To bring a discrimination claim, an employee needs to show either direct evidence of discrimination, or show an inference of such evidence by establishing a prima facie case. The elements of a prima facie case are outlined according to the burden-shifting framework established by the Supreme Court in *McDonnell Douglas*, which is controlling authority in Texas.[5] Under this standard, the employee must show that: (1) he was a member of a protected class; (2) he was qualified for his position; (3) there was an adverse employment action; and (4) he was replaced by someone outside of the protected class or there was a disparate treatment of others outside the protected class who were similarly situated to him.[6] Once the employee establishes his prima facie case, the burden then shifts to the employer to produce a legitimate, non-discriminatory reason for his termination.[7] This involves no credibility assessments and only requires the production of proof.[8] After the employer provides a legitimate reason the burden shifts back to the plaintiff to prove that the reason for his termination was only a pretext for discrimination.[9] Although the burden of production shifts, the burden of persuasion remains with the plaintiff at all times.[10]

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[3] *M.D. Anderson Hosp. and Tumor Institute v. Willrich*, 28 S.W.3d 22, 24 (Tex. 2000); *Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473, 476 (Tex. 2001); *AutoZone, Inc. v. Reyes*, 272 S.W.3d 588, 592 (Tex. 2008).
[4] *See* Tex. Lab. Code § 21.051.
[5] *Rodriguez v. City of Poteet*, No. 04-13-00274-CV, 2014 Tex. App. LEXIS 2136 (Tex. App.—San Antonio 2014); *See* also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

1. *Plaintiff's Brings No Evidence That He Qualifies as Disabled*

For a ***disability*** discrimination case under TCHRA, a plaintiff must show that: (1) he has a disability; (2) he was qualified for the job; and (3) Defendant's decision to terminate him was based on his disability.[11] Union Pacific acknowledges that Plaintiff is protected under two classes of people who bring discrimination claims: he is a Hispanic individual (race/national origin) who is over the age of 40 (age). However, Plaintiff erroneously asserts that he is also a member of the disabled protected class. Although

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[6] Although slight variations of the prima facie elements for discrimination cases exist due to the different facts of each case, the elements listed here have been stated by the Supreme Court of Texas, and are instructive. *See Mission Consol. Independent School Dist. v. Garcia*, 372 S.W.3d 629, 640-42 (Tex. 2012); *Jespersen v. Sweetwater Ranch Apartments*, 390 S.W.3d 644, 652 (Tex. App.—Dallas 2012).

[7] *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000); *Farrington v. Sysco Food Servs., Inc.*, 865 S.W.2d 247, 251 (Tex. App.—Houston [1st] 1993); *Duff v. Farmers Ins. Exchange*, No. 3:12-CV-1679-D, 2014 WL 1577786, at *8 (N.D. Tex. April 21, 2014); Chandler v. CSC Applied Techs, LLC., 376 S.W.3d 802, 814 (Tex. App.—Houston [1st Dist.] 2012).

[8] *Duff*, 2014 WL 1577786, at *8.

[9] *Farrington*, 865 S.W.2d at 251.

[10] *Id.*

[11] *Donaldson* No. 01-14-00736-CV, 2016 Tex. App. LEXIS 4749 (App.—Houston [1st Dist.] 2016); *Davis v. City of Grapevine*, 188 S.W.3d 748, 757 (Tex. App.—Forth Worth 2006, reh'g denied); See also *Spinks v. Trugreen Landcare, L.L.C.*, 322 F.Supp.2d 784, 792 (S.D. Tex. 2004)(variation of second prima facie element requiring a showing that person was discriminated against because of her disability instead of requiring that the person was qualified for the position).

Plaintiff believes he qualifies as disabled, he is still required to make a threshold showing of a disability to be a member of that protected class, which he has failed to meet.

To make a threshold showing of disability, Plaintiff is required to show that: (1) his obesity limits at least one major life activity; (2) there is a record of such an impairment; or (3) he is regarded as having such an impairment.[12] Furthermore, the EEOC has provided guidance on whether obesity can be qualified as a disability under the guidelines of the Americans with Disabilities Act ("ADA"), by noting that the obesity must ***substantially*** affect a body system, such as the neurological, respiratory, cardiovascular, reproductive, and digestive systems.[13]

Here, Plaintiff has failed to provide any evidence that his obesity[14] substantially limits a major life activity. At the most, Plaintiff stated that his obesity caused him to have sleep apnea where he must wear a CPAP mask at night and take a prescribed medication for asthma.[15] But Plaintiff admitted that he drives his car himself, he exercises everyday by walking every morning with his dog, he does not need the assistance of any type of oxygen or breathing equipment, and that overall, his obesity does not prevent him from living his life.[16] By Plaintiff's own testimony, his obesity never prevented him from performing his duties as a carman as well.[17] Evidently, Plaintiff's obesity does not limit any major life activities, therefore, he cannot qualify as 'disabled'.

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[12] Tex. Lab. Code Ann. § 21.002(6) (West 2009); *Morrison v. Pinkerton, Inc*., 7 S.W.3d 851, 854 (Tex. App.—Houston [1st], 1999, no pet. hist.).
[13] *Morrison,* 7 S.W.3d at 855; 29 C.F.R. § 1630.2(h)(1)(emphasis added).
[14] Plaintiff stated that he was five feet, six inches (5'6") tall and weighed two hundred and ninety-eight (298) pounds. (Ex A. at 68:25).
[15] (Ex. A at 78-80).
[16] (Ex. A at 80-82).
[17] (Ex. A at 70:3-15).

Next, Plaintiff has failed to provide a record of his impairment or that he is regarded as having such impairment. Plaintiff also failed to offer any evidence by any experts who can certify that his obesity substantially affects any of his body systems. Furthermore, Plaintiff was never regarded as disabled by Union Pacific. By Plaintiff's own admission, he has never asked Union Pacific to accommodate his physical condition, he has never reported such a disability to any of Union Pacific's personnel, and he was never restricted in his work due to his alleged disability.[18]

In short, Plaintiff offers no evidence to support his disability status other than his personal belief and statement that he qualifies as such; this is insufficient to support a prima facie claim.[19] Clearly, only individuals who truly suffer from a disadvantageous condition should qualify as "disabled", meriting protection. Plaintiff's attempt to qualify himself as "disabled" fails to warrant any such protection. For these reasons, Plaintiff's prima facie case of discrimination due to a disability fails on its threshold inquiry as a matter of law.

2. Plaintiff Brings No Evidence He Was Terminated Based Solely Upon Disability

Even assuming *arguendo* that Plaintiff has a disability and was qualified for the job, his claim necessarily fails as there is no evidence that Union Pacific's decision to terminate him was based *solely* on his disability of being morbidly obese.[20]

Plaintiff contends that other employees were "retired as medical" after they had suffered heart attacks or seizures due to their obesity.[21] Essentially, he states that

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[18] (Ex. A at 70:3-71:13).

[19] *Farrington*, 865 S.W.2d at 251 (citing *Montgomery v. Trinity I.S.D.*, 809 F.2d 1058, 1061 (5th Cir. 1987); *Hornsby v. Conoco, Inc*., 777 F.2d 243, 246-47 (5th Cir. 1985))(subjective beliefs of discrimination are not enough to establish a prima facie case).

[20] *See, Spinks,* 322 F.Supp.2d at 792.

[21] Ex. A. at 68:12 - 69:22.

Union Pacific discriminated against him for taking diet pills in an attempt to better himself.[22] Courts are clear that the plaintiff is the party charged with presenting sufficient evidence to create a reasonable inference of *discriminatory intent* in order to avoid summary judgment.[23] Here, no such reasonable inference is possible. In order for Union Pacific to terminate Plaintiff based on his disability, they must first be aware that any disability exists otherwise, no discrimination can occur.[24] Without being cognizant of Plaintiff's alleged disability status, his consumption of diet pills does not create the reasonable inference necessary as a matter of law. Many Americans choose to consume diet pills, but assuming all of them are 'disabled' individuals for doing so is an irrational assumption. No other evidence has been brought forth to demonstrate that Union Pacific terminated him based solely on his alleged disability. Accordingly, Plaintiff's prima facie claim for disability discrimination fails as a matter of law.

3. *Plaintiff Offers No Evidence That He Was Treated Less Favorably Than Similarly Situated Employees Who Were Of The Opposing Class (Non-Hispanic and/or Female)*

As discussed, Union Pacific does not dispute that Plaintiff is a Hispanic[25] male, who was qualified for the position that he held, and that he suffered an adverse employment action (termination). Notwithstanding, Plaintiff is still required to sufficiently bring forth a *prima facie* claim of discrimination as a matter of law. No evidence has been presented here to support the final element of his prima facie claim: that he was treated less favorably than *similarly situated* employees who are not in his protected

[22] Id.
[23] *LaPierre v. Benson Nissan, Inc.*, 86 F.3d 444, 449 (5th Cir. 1996); *See Richards v. Seariver Maritime Fin. Holdings, Inc.*, 59 F.Supp.2d 616, 624 (S.D. Tex. 1998)(emphasis added).
[24] *McIntyre v. Kroger Co.*, 863 F.Supp. 355, 359 (N.D. Tex. 1994)(stating that TCHRA requires evidence that points to some knowledge by Defendant that Plaintiff had a disability in order for Defendant to be charged with discriminating *because* of that disability).
[25] Plaintiff is of Mexican ancestry and was born in Piedra Negras, Mexico. His father, mother, and himself are naturalized U.S. citizens. (Ex. A. at 11:4-18).

classes for race and gender. [26] In this case, that would be non-Hispanic and/or females.

Plaintiff mentions one female in particular who had suffered a mild stroke and gained weight, which consequently interfered with her job duties.[27] He stated that this female was then offered medical retirement, but he (as a male) was not.[28] But the Texas Supreme Court and the Fifth Circuit have held that employees who are "similarly situated" are ones where the circumstances are comparable or nearly identical, including "similar standards, supervisors, and conduct."[29] It is unclear what position this female had at Union Pacific, but it is clear that Plaintiff was not "similarly situated" to her. He did not suffer a stroke, or experience job interference due to his obesity, these are not parallel scenarios such that one can fairly adduce that they were disparate treatment. The parallelism is necessary to determine whether Plaintiff would have been offered medical retirement if he too had suffered a stroke and gained weight that interfered with his job duties. If he was denied the opportunity, then clearly an inference of gender discrimination had occurred. But Plaintiff makes no other mention about the treatment of other females to adequately support his allegations. Therefore, as a matter of law, Plaintiff's gender discrimination claim falls flat on its final prima facie requisite.

Likewise, Plaintiff offers no evidence that different treatment occurred for similarly situated non-Hispanics. There are four references by Plaintiff that refer to race in a very general manner. The first is his original complaint, which contains statements such as: "Mr. Beltran is a Hispanic", and that "Plaintiff pleads he was replaced by someone outside the protected class….or non-Hispanic."[30] Next, Plaintiff stated that the person who replaced him in his job position was Hispanic, and that the other three foreman in Laredo were all Hispanics as well.[31] Finally, Plaintiff makes note that four of the five employees Dr. Barnett served as an MRO for and recommended termination for, were all Hispanic.[32] The positions and circumstances of these employees are unknown. To reiterate, it is Plaintiff who bears the burden of bringing some evidence (more than a scintilla and other than a subjective belief [33]) that ***non-Hispanic*** employees who were similarly situated, were treated more favorably. The various statements mentioned about Hispanics neglects this burden, and Plaintiff makes no mention of any non-Hispanics to support his claim. Moreover, any perceived discrimination in regards to Dr. Barnett cannot be addressed in an action against Union Pacific, as Dr. Barnett is not a Union Pacific employee. Consequently, Plaintiff's race discrimination claim fails as a matter of law.

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[26] *University of Texas Medical Branch at Galveston v. Petteway*, 373 S.W.3d 785, 789 (Tex. App.—Houston [14th] 2012, rev'g.); *Edwards v. Galveston-Tx. City Pilots*, 203 F.Supp.2d 759, 769 (S.D. Tex. 2002); *Harris County Hospital District v. Parker*, 484 S.W.3d 182, 196 (Tex. App.—Houston [14th] 2015*); Martin v. Kroger Co.*, 65 F.Supp.2d 516, 535 (S.D. Tex. 1999)(emphasis added).

[27] Ex. A. at 69:7-22.

[28] *Id.*

[29] *Ysleta Independent School Dist. V. Monarrez*, 177 S.W.3d 915, 917-18 (Tex. 2005, reh'g denied); See *Smith v. Wal-Mart Stores (No.471)*, 891 F.2d 1177, 1180 (5th Cir. 1990)(quoting *Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. 1982)).

4. Plaintiff Fails to Establish That His Termination Was Pretext for Age Discrimination

Plaintiff's sole statement regarding his age discrimination claim is that a person named Rudolfo Rengel, whom Plaintiff believed to be is "in his 20s" took over his position.[34] Plaintiff was born December 26, 1972. Rudolfo Rengel is approximately 12 years younger than Plaintiff, being born October 31, 1984. Although the fact that a younger worker replacement is relevant to a *prima facie* claim of age discrimination, it is not relevant in determining pretext.[35] Some courts have stated that the natural progression of the workforce is that as older employees move out of the labor market, they are replaced with younger ones (such as the railroad industry), and requiring every employer who terminates an employee and replaces him with someone younger to justify their actions, was surely not the intent of Congress.[36] Notwithstanding, as stated herein, Union Pacific had a legitimate, non-discriminatory reason for terminating Plaintiff's employment. Plaintiff has offered no evidence that would create a genuine issue of material fact for a reasonable inference to be drawn that his replacement by a younger worker was nothing more than a pretext for age discrimination. Therefore, Plaintiff's age discrimination must fail as a matter of law.

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[30] Pl's Comp. at ¶¶ 18, 19, 20.
[31] *See* Ex. A. at 71-74.
[32] (Ex. A at 90:2-8).
[33] *Georgen-Saad v. Tex. Mut. Ins. Co.*, 195 F.Supp.2d 853, 858 (W.D. Tex. 2002)(where court found that the plaintiff failed to adduce evidence other than her subjective belief that the defendant's actions were motivated by her gender, which failed to raise a genuine issue of material fact on her prima facie discrimination case)

B. Union Pacific Terminated Plaintiff's Employment for a Legitimate, Non-Discriminatory Reason: His Failed Drug Test.

As a common carrier, Union Pacific follows certain federal drug-testing standards and bears a duty to obey federal laws and regulations for positive drug tests from its employees.[37] Union Pacific also enforces a company-wide prohibition on the use of illegal substances by its employees.[38]

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[34] (Ex. A at 71:14- 73:12).

[35] *McKenna v. Baylor College of Medicine*, No. 01-15-0090-CV, 2016 WL 171480 at *7 (Tex. App.—Houston [1st] Apr. 28, 2016)(citing *Hennis v. Alter Trading Corp*., 341 Fed.Appx. 991, 994 n.1 (5th Cir. 2009; *Rachid v. Jack in the Box, Inc*., 376 F.3d 305, 309 (5th Cir. 2004).

[36] See *Laugesen v. Anaconda Co*., 510 F.2d 307, 312 n.4 (6th Cir. 1975)(analyzing comments from the House Report in regards to section 2(b) of Title VII, and stating that… "The House report recognized that in certain industries, such as the **railroad industry,** a disproportionately high number of older workers are found in the work force, and comments that: 'The committee does not intend the legislation be administered in such a way as to worsen a situation as this, or to prevent an employer from achieving a reasonable age balance in his employment structure. It is expected that the Secretary will recognize these particular situations and treat them according to their individual merits on a case-by-case basis. 1967 U.S.Code Cong. and Adm.News, at pp. 2219—2220."); *See also Marshall v. Hills Bros*., 432 F.Supp. 1320, 1325 (N.D. Cal. 1977)(stating that "Under plaintiff's theory, every employer who terminates an employee who is between 40 and 65 years of age and replaces him with a younger employee must justify the termination or be held liable for age discrimination. Congress surely did not intend such a result.").

As a company that transports hazardous materials and chemicals through populous cities and towns, there is an additional moral and ethical obligation to take proactive measures to ensure appropriate responsibility and accountability for its employees. In this matter, Plaintiff voluntarily agreed to be randomly drug-tested over the course of 60-months as a condition of his reinstatement in 2011. When the results from one of his random drug tests turned out positive for amphetamines/methamphetamines in 2014, Union Pacific promptly removed Plaintiff from service and subsequently terminated him after an investigation hearing was held where no satisfactory explanation was given for the results. Failure of Plaintiff to abide by the conditions of his reinstatement is a legitimate, non-discriminatory reason for his termination. Aside from this explicit contractual provision, Union Pacific's adherence to federal regulations that mandate drug testing results for railroad employees is also a legitimate, non-discriminatory reason for the adverse employment actions. Going further than that, court precedent is replete with decisions where a violation of a company rule on the consumption of illegal substances has been found to be a legitimate, non-discriminatory reason for an employee termination.[39]

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[37] (1) Drug and alcohol testing in the railroad industry must comply with DOT and FRA regulations and procedures. 49 C.F.R. Part 219; 49 C.F.R. Part 40; *see also* 49 C.F.R. § 219.701(a) (Drug testing must be conducted in compliance with Part 40).

(2) Under the Federal Railroad Administration ("FRA"), "No employee who performs covered service may use a controlled substance at any time, whether on duty or off duty, except as permitted by § 219.103." 49 C.F.R. § 219.102; 49 C.F.R. § 219.103 (governing prescription and over-the-counter drugs).

(3) Upon receipt of a verified positive test result, Union Pacific is required to immediately remove an employee from covered service/safety sensitive functions. 49 C.F.R. §§ 219.104(a)(1) ("If the railroad determines that an employee has violated § 219.01 or § 219.02, or the alcohol or controlled substances misuse rule of another DOT agency, the railroad must immediately remove the employee from covered service . . . "); 49 C.F.R. § 219.605(b); *see also* 49 C.F.R. §40.23(a) . Union Pacific is also expressly prohibited from permitting the employee to return to service/perform safety-sensitive functions unless he complied with the return-to-service and follow-up testing requirements, including a negative drug test result. 49 C.F.R. § 219.104(a) & (d); *see also* 49 C.F.R. §§ 40.305(a) & (b), 40.23(d).

(4) The FRA also imposes a duty on Union Pacific to prevent violations. 49 C.F.R. § 219.105(a) ("A railroad may not, with actual knowledge, permit an employee to go or remain on duty in covered service in violation of the prohibitions of § 219.101 or § 219.102.").

(5) Indeed, under the FRA, Union Pacific is subject to civil penalties if it does not comply with its provisions. 49 C.F.R. § 219.9(a) ("Any person . . . [including a railroad] . . . that violates any requires of this part or causes the violation of any such requirement is subject to a civil penalty of at least $839 and not more than $27,455 per violation . . . ."); (Part 219 Appendix A) (containing civil penalty schedule for violations, including failure to remove employee from covered service immediately, an employee improperly returned to service, or employee improperly returned to service).

(6) Under DOT regulations, Union Pacific has no ability to alter or change the verified positive test result reported to it. 49 C.F.R. § 40.23(i). The determination of whether there is a legitimate medical explanation for a positive test result is solely the responsibility of the MRO. 49 C.F.R. §§ 40.123 (MRO duty to act as independent and impartial "gatekeeper" and advocate for the accuracy and integrity of the drug testing process and determine whether legitimate medical explanation for confirmed positive test results from laboratory), § 40.135 (verification interview), § 40.137 (verification of test results involving amphetamines), § 40.141, § 40.149 (MRO's ability to change a verified drug test result).

(7) The MRO is a separate and distinct legal entity from Union Pacific. 49 C.F.R. § 40.135. Union Pacific is expressly prohibited from altering drug test results transmitted by the MRO. 49 C.F.R. § 40.23(i); *see also id.* § 40.167(e) ("MRO reports are not subject to modification or change by anyone other than the MRO, as provided in §40.149(c)").

[38] *See*, Affidavit of Penny Lyons, attached as Exhibit A to Defendant's Reply to Plaintiff's Motion for Re-Testing of Remaining Split Sample Specimen (Doc. 18).

Under the TCHRA, a plaintiff must prove that the employer discriminated intentionally.[40] Any subjective beliefs or feelings, "conclusory allegations, improbable inferences, and unsupportable speculation" are all insufficient evidence to prove that the reasons for his termination were false, rendering summary judgment for an employer as proper.[41] Plaintiff states that the only discrimination event he is claiming is his termination on January 9, 2015.[42] For that event, Plaintiff failed a drug test and Union Pacific acted accordingly. Plaintiff has failed to furnish any evidence that this action taken by Union Pacific was discriminatory in nature, other than his own conclusory allegations. His burden has not been met with either circumstantial or direct evidence of discrimination. Thus, Plaintiff's discrimination claims must fail as a matter of law.

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[39] *See Grooms v. Wiregrass Elec. Co-op., Inc.*, 877 F.Supp. 602 (M.D.Al. 1995)(where under federal law, employer was required to do mandatory drug testing of employees, holding that employer acted appropriately in suspending employee); See also *Young v. Chicago Transit Authority*, 189 F. Supp.2d 780, 789 (N.D. Ill 2002)(Where court found that Plaintiff presented no evidence that employer failed to follow its drug testing and policy procedures and applied them in a discriminatory manner towards plaintiff); See also *Brown v. Triboro Coach Corp.*, 153 F. Supp.2d 172 (E.D.N.Y. 2001)(where plaintiff did not come up with sufficient evidence to cast doubt on employers non-discriminatory reason for termination-a second positive drug test); See also *Bailey v. Real Time Staffing Serv., Inc.*, 543 Fed.Appx. 520 (6th Cir. 2013)(where plaintiff could not overcome employers legitimate reason for termination-failed drug test); See also *Tatum v. City of Berkely*, 408 F.3d 543 (8th Cir. 2005)(where plaintiffs could not overcome City's legitimate reason for terminating them-their undisputed use of illegal drugs).

[40] *Chandler v. CSC Applied Technologies, LLC*, 376 S.W.3d 802, 814-15 (Tex. App.—Houston [1st] 2012)(citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-47 (2000); *Elgaghil v, Tarrant County Junior College*, 45 S.W.3d 133, 141 (Tex. App.—Ft. Worth 2000); *Greathouse v. Alvin Independent School Dist.*, 17 S.W.3d 419, 425 (Tex. App.—Houston [1st] 2000).

[41] *Id.*

V.
PRAYER

Plaintiff has failed to establish even a *prima facie* claim of discrimination. Even if he had, nothing negates the fact that Plaintiff was terminated for the legitimate, non-discriminatory reason that he failed a federally mandated drug test and under the applicable law his termination is wholly appropriate. This case should be dismissed.

Respectfully submitted,

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[42] (Ex. A at 75:24-76:7).

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of December, 2016 a copy of the foregoing instrument was served by Electronic e-file and/or certified mail return, receipt, requested on:

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